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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 21, 22 and 32

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

FEDERAL POWER COMMISSION, *Petitioner*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS, THE SUPERIOR OIL COMPANY AND J. RAY McDERMOTT & CO., INC.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 620-642) is reported at 335 F.2d 1004. The

opinions of the Federal Power Commission, Opinion Nos. 398 (R. 549) and 398A (R. 606) are published at 30 FPC 283 and 682.

JURISDICTION

The judgment of the Court of Appeals reversing the Commission's order and remanding the proceedings was entered on August 14, 1964 (R. 643). Orders granting the petitions in Nos. 21, 22, 26, and 32 were entered on March 8, 1965 (R. 645-647), 380 U. S. 931.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED[1]

1. In a Certificate Hearing Under Section 7 May the Commission Properly Exclude all Evidence Other Than That Related to "In Line" Price?
2. In Such a Hearing May the Commission in a Permanent Certificate Order Deny Applicant the Right to Seek Rate Increases Authorized by Section 4 of the Act?
3. In Such a Hearing and Order May the Commission Require Applicant to Refund Amounts Collected Under its Prior Unconditioned Permanent Certificate Orders?
4. Assuming Arguendo That Absent Prior Condition or Agreement, a Permanent Certificate Order of the Commission May Impose an Obligation for Refund of Amounts Collected Under Prior Permanent Unconditioned Orders Vacated

[1] See Appendix "A", P. i.

ON REVIEW, MAY SUCH OBLIGATION BE MEASURED BY THE PRICE LATER FOUND "IN-LINE" WHEN:

A. THE "IN-LINE" PRICE ADMITTEDLY IS NOT JUST AND REASONABLE AND IS SHOWN TO BE CONFISCATORY?

B. THE PRIOR PRICES WERE COLLECTED UNDER ORDERS WHOSE EFFECT WAS NEVER STAYED?

C. APPLICANTS ARE COMPELLED TO ACCEPT THE CONDITIONS SUBSEQUENTLY IMPOSED BECAUSE THEY ACCEPTED THE PRIOR UNCONDITIONED ORDERS?

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States,[2] and Sections 4, 7(c) and (e), and 19(c) of the Natural Gas Act (Act), 52 Stat. 821, as amended, are involved in this case. The pertinent portions of said Fifth Amendment read as follows:

> "No person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use without just compensation."

Section 19(c) of the Act:

> "The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." [52 Stat. 831 (1938); 15 U.S.C. 717r]

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[2] All section references are to the sections of the *Natural Gas Act*, 52 Stat. 821, as amended, 15 U.S.C.A. 717-717w.

Sections 4, 7(c) and 7(e) of the Act are set forth in Brief for the Federal Power Commission (Commission), Petitioner, App. A, P. 61-65.

STATEMENT OF THE CASE

The statement set forth in Commission Brief seems generally fair and will not be elaborated on at this point.[3] Details omitted therefrom will be set forth to the extent necessary in argument.

Brief of Petitioners in No. 21 will be referred to as that of UGI, brief of Petitioner in No. 22 will be referred to as PSC, and brief of Petitioner in No. 32 will be referred to as Commission.

SUMMARY OF ARGUMENT

This case is *sui generis*. The matters here involved arise in large measure because of the unique circumstance resulting from the commencement of sales in 1959 based on permanent unconditioned certificate orders which then became effective notwithstanding court review. All of such 1959 orders were later vacated by the courts because of insufficient record evidence and remanded to the Commission. The Commission orders here involved are those on remand. Thus, while purportedly "initial" certifications, such orders are retroactively applicable back to 1959. It is claimed that Respondents are bound to accept such orders regardless of the economic impact of price conditions therein which are claimed to be retroactive.

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[3] The statement "The court below held that the Commission erred in conditioning the certificates to an 'in-line' price • • •" (Com. Br. P. 7) is perhaps inadvertent error. The court simply held that "in-line" price, along with all other factors of public interest, must be evaluated and balanced. The "in-line" price may or may not be the public interest price (R. 628.)

In effect it is urged that Respondents are in an inescapable regulatory trap because they complied with the effective terms of Commission orders later held to be insufficiently supported by the early hearing records. There are no other such cases before the Commission. The only general regulatory policy of the Commission here involved is one fairly recently adopted [4] of arbitrarily refusing to admit or consider any evidence on public interest requirements other than that of price line and depriving natural gas companies of their statutorily preserved right to file rate increases.[5]

On the remanded hearing before the Commission, Respondents presented evidence designed to show that the prices proposed were required by present or future public interest because they were not "out of line", and that even if they were out of line, they were nonetheless required by present or future public convenience and necessity. Having no standard by which to measure in advance of hearing what evidentiary presentation would be deemed a sufficient showing of a "reason why" an out-of-line price was required by present or future public interest, Respondents, in an excess of caution, offered many different types of evidence, much of which was probably unnecessary. Such evidence showed that costs of finding, producing, and selling gas trended sharply upward from 1954 to 1960; that gas supply relative to annual withdrawals has trended sharply downward during the same period; that while demand for gas has trended upward, explor-

[4] See *Skelly Oil Co., et al.*, Docket Nos. G-18368, *et al.*, 28 FPC 401, 411 (1962), and even there the evidence was admitted but found insufficient.

[5] Under Section 4 of the Act.

ation (shown to be related to the field price received) has trended downward. In addition, Respondents' evidence showed that their historical unit gas costs on a rate base cost-of-service method, and their financial requirements for finding, producing, and selling such gas "was considerably in excess" of the prices collected (R. 623). All of this evidence was rejected by the Commission on the ground that it was irrelevant in a certification proceeding. The only relevant evidence was held to be that showing previously certificated prices as to which only prices the Commission had certificated at rates of 18.5¢ per Mcf or lower could be used to establish a price line to which the proposed prices could be compared; that under no circumstance could present or future public convenience and necessity require a higher price. This is the error found by the court below. It held that the evidence proffered was relevant to factors of present and future public interest and must be received and evaluated, along with the proposed price, in a final determination of public interest requirements.

The procedure for certification required by the court below is not unduly burdensome on the Commission. It is practicable and at the same time complies with the statute. Undoubtedly it would require, as does the statute, a hearing. Such hearing would not have to be extensive. If the price proposed was within the range of prices comparable with those being contracted for, certificated or paid in the area at the relevant time, other showing would be unnecessary. This would cover most situations. In the relatively few circumstances where the proposed price was out of line with the range of comparable prices, a "reason why" the proposed price was required by public interest

would then be necessary. Such showing would not need to be extensive if some reasonable standards by which to determine what evidence was and what was not necessary for such a showing were announced. No unnecessary evidence would be tendered.

We have not argued here the several factual and legal issues involved in the Commission's finding, which we deem erroneous, that 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement is the proper "in-line" price here. These questions were not raised nor fairly comprised in the questions presented in the several petitions for writ of error which the court granted. Under the Court's Rule 23(1)(c) we feel that those questions are not before the Court. If the Court wishes to consider these questions, we pray the opportunity to present a supplemental brief thereon with such further argument, if any, as the Court desires.

Since the proffered evidence showed that Respondents' cost exceeded the prices collected, and its rejection makes it conclusive on that issue, the Commission order imposing a reduction of such prices, for the past, present and future, constituted confiscation of Respondents' property. In addition, the Commission's refusal to consider relevant evidence offered on the statutory issue before it deprived Respondents of a full and fair hearing or due process of law.

The limited hearing held and the Commission order issued deprive Respondents of any opportunity of ever showing their entitlement to their contract prices between 1959 and the present. This results from the retroactive reduction of the so-called "initial" rate. That order adds further injury to loss by precluding filings for rate increases until approximately July 1,

1967. In this respect the Commission violates the regulatory framework of the Act created by Congress. This error is aggravated when, as here, Respondents' costs exceed their contract prices.

The Commission order for refund of amounts previously collected by Respondents was also erroneous. If in any case the Commission could order a refund, it could not properly do so here where the effect of the refund would be to impose a confiscatory rate on these Respondents. The fact is, however, under the present Act the Commission has no power to order reparations under the Act and refunds here are nothing but reparations. It lacks any inherent power normally flowing from general equitable powers because it lacks such equitable power.

Assuming *arguendo* that the Act authorizes the Commission to order refunds in some circumstance, it cannot do so here. Refunds are a form of restitution allowed to recoup amounts by which a party has been unjustly enriched. Respondents have collected only amounts they were obliged to collect under the Act. The self-styled Consumers' Representatives, Petitioners here, failed to protect themselves when they could have and they cannot equitably claim injury resulting from such failure.

In addition, Respondents' collections have been less than their costs. They have not been enriched at all, not even justly.

As the court below held, the Act protects the consumer only from unjust or excessive prices. The consumer is not entitled to rates lower than those which are just and reasonable. The "in-line" price is not a "reasonable" rate and thus there is no valid basis

for determining the quantum, if any, of refund. The present refund order is necessarily premature as the court below found.

ARGUMENT

I

Introduction

Petitioners in seeking to sustain the instant retroactive conditioning power of the Commission argue that in the normal Section 7 proceeding the Commission may condition downward a proposed price and no harm is done because acceptance of the conditioned certificate is elective. However, in the instant case they deny Respondents any such election.

Petitioners argue that a certificate condition reducing the initial contract price to an alleged "in-line" price is essentially "fair" to consumers and producers alike because even though the reduced price is not just and reasonable, the producer is then [6] free to increase his rate to the contract price and have the increase judged on the standards of just and reasonable, and the consumer is protected in the meantime. However, the right of these Respondents to file for their initial contract prices is denied for nearly ten (10) years. Because of Section 4(d), Respondents cannot possibly seek to change the conditioned rate for any past period.[7] This is now six years. Thus, Respondents are completely denied their initial contract rates,[8] although

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[6] Collection of any increased rate would be deferred thirty days Sec. 4(d), and if to be "tested" would be deferred an additional five months, Sec. 4(e).

[7] Section 4 does not permit retroactive filing for a rate change. *Shell Oil Co.* v. *Federal Power Com.*, 334 F.2d 1002, 1009 (3 Cir. 1964).

[8] For the past six years, and to July 1, 1967 if Petitioners have their way.

the justness and reasonableness thereof is a completely open and undecided matter. The justness and reasonableness of the "in-line" price imposed on Respondents for six years and of the anti-triggering line to approximately July 1, 1967 is also a completely open and undecided question.[9]

We do not contend that the Commission may not condition downward a proposed price in an *ex parte* temporary authorization, nor in a permanent order made after hearing where all factors of public interest duly balanced so require, provided in each case the applicant has then the election to reject the certificate, or to accept it and immediately file for the higher contract prices. That, however, is *not* this case.

The position of Respondents should be considered. The 1958 and 1959 permanent, unconditioned certificate orders were entered after full hearings, and in most cases, in the light of this Court's prior *Catco*[10] decision. The several proposals were found to be required immediately by public convenience and necessity. Urgency was shown by the requirement in most of the orders that they be accepted or rejected within not more than thirty days.[11] Petitioners here, United Gas Improvement Company and Public Service Commission of the State of New York, who deem them-

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[9] FPC Brief before the Fifth Circuit, Pg. 22; UGI and PSC Brief before the Fifth Circuit, Pg. 12.

[10] *The Atlantic Ref. Co.* v. *Public Service Com. of N. Y.*, 360 U.S. 378, (1959).

[11] 22 FPC 369, 377, Par. (C); 22 FPC 252, 260, Par. (C); and R. 123 "• • • there will be a definite deficiency • • • if additional gas is not obtained at once." It seems less than speculative that absent the gas supply made available by these Respondents, the public would have suffered from lack of gas since 1959.

selves "consumers' representatives", had contested the unconditional issuance of each of those certificate orders.[12] Under the provisions of Section 19(c) of the Act, however, those orders became effective unless stayed. No effort whatsoever was made by any party to obtain a stay. Respondents, therefore, notwithstanding possible court review, were bound to recognize the current effective nature of said orders and to comply therewith. This they did. Respondents could not stay the effect of orders which as to them were non-aggrieving. Therefore, they filed their contracts as rate schedules, and same were accepted by the Commission. Respondents commenced deliveries of gas under these effective rate schedules. It is the Respondents' compliance with the early orders, and the fact that a so-called "initial" certification order now to be entered will relate back to first deliveries, which Petitioners argue should place Respondents in a regulatory trap, a trap from which it is contended they should not be permitted to escape, regardless of the serious financial injury they suffer. All similar remanded cases have been disposed of[13] and we are not here concerned with temporary authorizations.[14]

It is almost inconceivable that the Commission, as a Petitioner here, would take such a position. Certainly the public interest is going to be greatly injured if every applicant who receives a satisfactory order of

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[12] Strangely enough in the light of their present contrary positions, on the ground that the proposed prices had not been shown to be just and reasonable (R. 32; 22 FPC 653; 22 FPC 655, 656; 22 FPC 657, 658).

[13] FPC Br. Pg. 5, Fn. 6.

[14] PSC Br. Pg. 21 "In the present case, of course, no temporary certificates are involved * * *."

certification after a contested hearing must await judicial review and affirmance of the Commission order before taking any step to implement the action which the Commission has found the public interest THEN requires.

The well nigh interminable delay of Section 5 investigations would seem expeditious by comparison. Section 19(c) of the Act is designed to prevent this very thing.

II

The Court Below Properly Reversed the Commission Order on Remand Because it Failed to Consider Evidence Bearing on all Factors of Present and Future Public Convenience and Necessity.

A. *The proffered evidence.* It is not deemed necessary to detail the evidence offered by Respondents and rejected by the Commission. In the words of the court below " * * * * it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought * * * * " and it "showed the demand and supply situation existing both nationwide and in South Louisiana" and was "tied directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like" (R. 623).

B. *The proffered evidence was relevant.* Significantly, none of the Petitioners contend in their Briefs that the proffered evidence of Respondents was not relevant and material to the factors of present and future public convenience and necessity. Their omission in this respect is understandable in the light of this Court's decision in *Federal Power Commission v. Hunt,* 376

U.S. 515, 525 (1964). There the Court had occasion to consider the power of the Commission under Section 7(c) and (e) of the Act as amended in 1942 and the purpose of the amendment. It was held that the purpose of the amendment was to give the Commission an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure of an applicant at the time of certification.[15] It goes without saying that the adequacy of gas reserves is shown by available gas supply relative to the current demand for gas with and without the proposal. Supply and demand was shown by the proffered testimony.[16] The feasibility and adequacy of a proposal necessarily depends upon whether revenues from a proposed sale will meet the financial requirements of the applicant in order that the supply of gas may be maintained. Financial requirements testimony was proffered.[17] The characteristics of a rate structure cannot be examined without evidence as to the proposed rates and their relation to the costs of the applicant. Historical cost of service was included in the proffered testimony.[18] Prices contracted for or previously certificated, the only evidence admitted into the record,[19] do not touch any of these factors.

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[15] House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1290, 77th Congress, First Session, 203, and Senate Committee on Interstate Commerce, S. Rep. No. 948, 77th Congress, Second Session, 1-2.

[16] R. 623.

[17] R. 623.

[18] R. 623.

[19] R. 201.

C. *All factors of present and future public interest must be weighed and balanced.* The judgment of the court below is fully supported by a reading of Section 7(e) of the Act and the construction of that section by this Court and by other courts of appeals previously considering and vacating prior Commission orders in these cases.

Sections 7(c) and (e) of the Act[20] provide for a hearing[21] and that an applicant otherwise shown qualified shall be granted a certificate if the proposal "is or will be required by the present or future public convenience and necessity". The requirement for hearing includes a full and fair hearing to square with constitutional due process of law.[22]

This Court specifically held in *Catco* that said section "requires" the Commission to "evaluate all factors bearing on the public interest" and that while proposed rates are a matter of prime importance they are not the only factor to be considered. The same point was made in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1 (1960), when the Court again pointed out that Section 7(e) *requires* an evaluation of all factors bearing on the public interest and further pointed to the fact that the Commission's powers under Section 7 are "by definition limited", the limitation being that the Commission cannot require or compel the commencement of a sale. Its only function is to "exercise a veto power" over a proposal, and "it can only do this when a balance of all the circumstances weighs against certifica-

[20] Commission Brief, Appendix "A", Pgs. 64-65.

[21] *Federal Power Com.* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575, 583 (1942).

[22] *Morgan* v. *United States*, 304 U.S. 1, 18 (1938).

tion", 365 U. S. 1, 17. The Court also held that the term "public convenience and necessity" connotes a "flexible balancing process in the course of which all factors are weighed prior to final determination" and cited with approval *City of Pittsburgh v. Federal Power Com.*, 99 U. S. App. D. C. 113, 237 F.2d 741 (1956), finding it reversible error for the Commission to fail to consider even factors within its power of notice.

D. *The "law of the case" here is to the same effect.* Even if the purpose of this section of the Act and duty of the Commission under it had not been so clearly defined, here where each of the original certificate orders has been vacated and remanded to the Commission by an appellate court the proffered evidence would have been relevant under the law of the case as announced in the remanding cases. *Federal Power Commission v. Pacific Light & Power Co.*, 307 U.S. 156, 160 (1939); *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529, 532 (7 Cir. 1953), *cert. den.* 346 U. S. 909.[23] These remanding opinions employed the same rationale as the opinion below in their specific application of the "in-line" price concept announced by this Court in *Catco*. In each case the order was vacated for insufficient evidence and the cases remanded to "augment" the record to show a "reason why" the proposed prices were required. The Ninth Circuit in *United Gas Improvement Co. v. Federal*

[23] In the *Pacific Light* case it was held that the Court's judgment is "final and indisputable" as between the Commission and the parties. In *Morand* it was held that "In such a situation it behooves the inferior arbiter to exercise great care that 'the law of the case' is applied to the facts of the case when they have been precisely determined by it. This is even so when it finds itself in well founded disagreement with its reviewer."

Power Commission, 283 F.2d 817, 821 (1960), specifically pointed out that circumstances such as increased production costs, and others, might justify unconditional permanent certification of a price higher than a previous line of prices because of public interest requirements. To the same effect the Tenth Circuit decision in *United Gas Improvement Co. v. Federal Power Com.,* 287 F.2d 159, 163 (1961) held:

> "... public convenience and necessity may require certificating of a sale when the price is 'out of line'."

The Fifth Circuit's prior opinion in *United Gas Improvement Co. v. Federal Power Com.,* 290 F.2d 147, 148 (1961), reversed the Commission order for lack of evidentiary support and because in issuing same too little consideration had been given "to what might ultimately be a just and reasonable price."

The D. C. Circuit in *Public Service Commission v. Federal Power Commission,* 287 F.2d 146 (1960), held that when faced with a "suspiciously" high price for certification the Commission might attach such condition as it believes necessary or "grant unconditional certification upon evidence sufficient 'to support a finding of public convenience and necessity'" (at 149). That court reversed the Commission because the proposals there could not properly be unconditionally certificated by the Commission "without the supporting evidence that case [Catco] requires" and remanded for the specific purpose of permitting applicants there, some of whom are Respondents here, "if they so choose" to either "augment the record so as to support a certification without price condition or seek a certification appropriately conditioned", P. 150.

Each of these remanding decisions by the various courts of appeals construed this Court's *Catco* de-

cision in the same general way. Each recognized that a proposed price was of prime importance but was not the only factor to be considered and that to determine present or future public interest *all* factors must be evaluated and weighed.

E. *Catco so held.* Petitioner FPC contends that *Catco* held that the Commission committed error in giving controlling weight to elements of the public interest other than price. *Catco* held that *controlling weight* should not be given to *any* specific factor of public convenience and necessity but, to the contrary, all factors, recognizing price as of primary importance, should be evaluated in the balancing of public interest.

It is really very difficult to determine precisely what significance Petitioners place upon this Court's *Catco* decision. Indeed, the FPC Brief at Page 22 says that "Catco merely held that there was an insufficient evidentiary basis for certificating the Catco producers at a firm price 4.4¢ above that which the Commission had earlier found was the highest justified by the public interest", from which it argues that the Court did not "indicate" what evidence the Commission must consider for certification. Since *Catco* held that Section 7 required an evaluation of *all* factors of public interest and the Court was surprised that *evidence,* if available, showing a "reason why" that higher price was required by public convenience was *not presented,* it is submitted that *Catco* went beyond the point of "indication". Certainly *all* factors cannot be evaluated, nor a "reason why" shown without evidence in the record. Such a showing is obviously impossible if the Commission may summarily reject all evidence other than that relating to the line of past prices.

F. *Decisions relied on do not support Petitioners.* Great emphasis is placed by all Petitioners on the cases of *California Oil Company v. Federal Power Commission,* 315 F.2d 652 (10 Cir. 1963), and *The Atlantic Refining Company v. Federal Power Commission,* 316 F.2d 677 (D. C. Cir. 1963). Neither of these cases supports the contention that the consideration of "in-line" price testimony, to the exclusion of all other proffered evidence, is sufficient to justify a determination of public convenience and necessity. In these cases such issue was not raised. In those cases the parties had agreed that certificate issuance should be determined on the basis of an "in-line" approach.[24] The controverted point was the level of "in line" price. This would explain the "serious doubt" of the Tenth Circuit Court as to whether costs or delivery services were at all relevant to a determination of an "in-line" price. Obviously a price *line* is determinable only by prices. Costs become relevant only when the "in-line" price has been determined; is deemed by the applicant insufficient; and then further evidence which may include costs is submitted to show a "reason why" the "in-line" price should *not apply* to the proposed sale. This is our case.

To a certain extent the issue in *Public Service Commission of the State of New York v. Federal Power Commission,* 329 F.2d 242 (C.A. D.C. 1964 "Skelly") *cert. den.* 377 U. S. 963 was also limited to "in-line" price level. The order reopening that case was based upon a rehearing granted by the Commission as to the "in-line" price. Most of the evidentiary presentation

[24] 316 F.2d 677 at 680: "But here • • • [all parties] • • • agreed that price was the only issue to be considered • • •" for which reason "considerations other than price" could not be gone into.

and arguments of the parties related to what was in fact the "in-line" price. Notwithstanding, two of the producers did introduce other evidence of a limited nature. Such limited evidence the Commission found would "not form a proper basis for appraising financial requirements", 28 FPC 401, 410, 411. It is significant that the evidence *was received* and *was in fact considered* by the Commission, and even by the Court. On the basis of such consideration it was found insufficient to show a "reason why" the public interest required the proposed out-of-line price. The statement by the Commission that it did not think it "necessary or appropriate" to consider the evidence is belied by its opinion holding the evidence itself insufficient. The same is true of the Court's affirming, but somewhat equivocal, decision.[25] Be that as it may, the Court of Appeals' interpretation in *Skelly, supra*, of this Court's *Catco* opinion as "calling upon the Commission in Section 7 proceedings to condition certificates by requiring an 'in line' initial price" is obviously incorrect. All factors must be evaluated under *Catco* and *Trancontinental Gas Pipe Line Corporation, supra*. In *Skelly* the appellate court, like the Petitioners here as found by the court below, may have been "mesmerized" by the catch phrase of "in-line" price. Obsession with reducing prices (which incidentally have not leaped from plateau to plateau)[26] can become so complete that

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[25] 329 F.2d 242, 247: "• • • we need not hold that the Commission may never consider such evidence • • •."

[26] R. 222. See also Commissioner O'Connor's dissenting opinion in Opinion 468, Area Rate Proceeding AR61-1, issued August 5, 1965, Mimeo. pp. 17, 18; 34 FPC —, not yet reported. The moving average gas price in 1954 was 1¢ per Mcf less than in 1922, and the increase from 1954 to 1960 "oft-emphasized" was but .9¢ per Mcf greater than the "seldom emphasized" decrease from 1922 to 1940.

there is a failure to recognize that the public interest is injured by *too little gas* at an unreasonably low rate, but is served by "maintenance of adequate service" at a just and reasonable rate.

G. *Petitioners would ignore the statute.* The real position of Petitioners here is that regardless of statutory requirement what was done was "reasonable and necessary" [27] and should be permitted to facilitate administration of the Act under the "hold the line" statement of this Court in *Catco.* They ignore the holding, also in *Catco,* that the Commission should *not* "determine initial prices" but might condition them by providing for their collection subject to refund pending a "just and reasonable" determination under "other sections of the Act", 360 U. S. at 392.

Petitioners then contend that resort to "in line" certification will reduce the administrative backlog. This may be true for the real effect is to eliminate all hearings under Section 7. This, notwithstanding the statutory duty for hearings to determine present or future public convenience and necessity.

This indicates a total misconception of the Act. The public interest requires gas in large and increasing amounts. It is to be protected from lack of gas or an inadequate supply just as diligently as it is to be protected from excessive prices. The purpose of the Act is to make gas available as needed at the lowest reasonable price. *Federal Power Commission v. Hope Natural Gas Company,* 320 U. S. 591, 611; *Catco, supra,* at 388. Under Section 7 of the Commission has no right to prohibit the entry into interstate commerce of needed gas at any rate that is reasonable.

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[27] Commission Brief P. 16.

Federal Power Commission v. *Texaco Inc., et al.*, 377 U. S. 33 (1964), held unequivocally that the regulations there under consideration "do not pass on the merits of any rate structure nor on the merits of a certificate * * * *" application. "They merely prescribe qualifications for applicants", 377 U. S. at 42. Here the merits alone are at issue.

The Commission complains of the burden of considering elements of public need for gas and the economic requirements of the producers to provide the supply needed. Any determination of public interest is complex, but the balancing of "all the circumstances" is required by the statute. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation, supra.* Furthermore, the solution is suggested in *Catco* and is that required by the Court below.

H. *Statutory compliance is practicable.* First a reasonable "line" should be employed. It should be a range based on new contracts, new certifications, and current prices under older contracts in the area. A proposal no higher should be deemed in line. Assuming public need for the gas is shown, or is conceded, certification should issue without price condition.[23] Thus, a realistic establishment of a price line would reduce most hearings to a minimum. The bulk of all

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[23] In this connection the record refutation of the Commission's alleged need for protection against a "run-away gas price structure" is found in the testimony of Dr. J. Rhoads Foster (R. 222), i.e., "The upward push of South Louisiana prices began to slacken in 1957-1958 * * * and as Schedule 5 shows, the weighted average of initial base prices in South Louisiana leveled off at slightly below 21¢ per MCF" (exclusive of tax reimbursement). Obviously, a weighted average encompasses prices above and below the average.

proposals in the last few years would not be out of line.

If the price proposed is considerably higher than any prior prices, as in *Catco*—25% higher, then a full "reason why" should be required. In such a case, however, the fixing of reasonable standards for that type of hearing would bring the matter into manageable proportions. Compar[illegible]e drilling costs of the proposed supply with existing supply in the area might be sufficient, or a showing of cost trends for finding, producing, and selling gas of the particular applicant, or of all producers in the particular area, or of the entire industry, might be sufficient. Perhaps an industry-wide study of replacement costs might be required. The point is some idea of what would be sufficient would permit elimination of much evidence.[29] It would never be necessary to precisely determine a just and reasonable rate. The only necessary finding is that on the basis of the showing made the proposed higher price does not appear to be excessive, or is within the zone of reasonableness of a price that might ultimately be a just and reasonable rate, i.e. balancing the public need for the gas against the indicated financial requirements of the producer.

The hypothetical problem posed by Public Service Commission Brief P. 26 is one solved by the above process. If the "flexible balancing" weighs against certification, the application must be denied, or conditioned so that the public and the producer are protected. Commission Brief P. 18 correctly points to

[29] The court below refers to the possible need for ingenuity. We here suggest that tremendous inventiveness is not required, only the establishment of reasonable standards. *Hill* v. *Federal Power Commission*, 335 F.2d 355 (5 Cir. 1964).

the advantage of a firm unconditioned price to a producer. The disadvantages of uncertain conditions and possible refunds are implicit in that statement. Thus inadequate protection, if any, to the public under refund agreements, *Federal Power Commission v. Tennessee Gas Transmission Company,* 371 U. S. 145 [30] is balanced by a weighing of the need of the public against the apparently reasonable requirements of the applicant. The public should not be permitted to obtain gas at a price that is confiscatory to the producer.

If after all factors have been evaluated and weighed, the proposed price is not shown to be that required by public interest, to the extent that it appears excessive it should be appropriately conditioned, prospectively. Certainly a refund requirement prospectively imposed, is of significant protection to the gas user. Congress deemed it fully adequate, Sec. 4(e) of the Act.

III

The Issue of the Propriety of the "In-line" Price Found by The Commission Is Not Presently Before The Court.

Respondents raised and preserved before the Commission and the lower court serious questions as to the method by which the supposed "in-line" price was determined. It was pointed out that the method was circuitous, resulted in a price "freeze" never intended by the Act or *Catco,* disregarded prices at which large quantities of gas were then moving in commerce, and failed to take into account the Commission's own find-

[30] The inadequacy of refund there referred to was between a pipeline and the ultimate consumer. Frequently a new purchase, even at higher prices, does not result in increased pipeline charges. In such case protection would be adequate. In any case this and all other factors would have to be evaluated.

ings in other dockets. The lower court did not reach this point, and stated that these issues would be open on remand for rehearing and redetermination (R. 641).

None of the petitions for writs of certiorari submit questions upon this issue nor is it fairly comprised in questions which were submitted. Petitioners in brief would now present such question and ask that the Court here resolve the factual [31] legal [32] issues involved without prior consideration by the Court below. (See, e.g., FPC Brief, Pgs. 28-36.) The reason given is the delay resulting from an appropriate remand if reversal occurs.

This Court's rules [Rule 23(1)(c)] and decisions [33] indicate that the Court will not decide questions not included in the petitions granted.

For the above reasons, we do not here go into this question and the issues involved. Should the Court wish to now entertain the suggestion of a decision on

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[31] For example: In its remand opinion the Ninth Circuit expressly held that the Commission was obliged to consider 16 certain rate schedules therein referred to for determination of the price line. *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F.2d 817, at 825. The Commission did not consider such sales. This clearly requires a determination of fact as to what the "line" would be if these higher priced sales had been considered.

[32] For example: In fixing a "line" for its tax reimbursement finding of 1.5¢ per Mcf the Commission chose to disregard all evidence from this record based on its findings solely on another case to which Respondents were not parties and involving a different time period and different evidence. May this be done, legally, when there is no evidence in this record to support the line found and this record supports only a higher figure for this item?

[33] *Mazer* v. *Stein*, 347 U.S. 201, 208 (1954). "The court's consideration will be limited to the question presented by the petition for the writ of certiorari." Cf. *Irvine* v. *California*, 347 U.S. 128, 129 (1954); *Lawn* v. *United States*, 355 U.S. 339, 362 (1958).

the question, Respondents request the opportunity of filing a supplemental brief concerning the matter and any further argument the Court may desire.

IV

The Court Below Properly Reversed the Commission Order Which Imposed a Moratorium on Rate Filings Authorized by Section 4 of the Act.

A. *Prior decisions support the court below.* As pointed out by the court below, the Commission Brief before that court [34] recognized that the courts in all of the decided cases bearing on the point have held that natural gas companies have a statutory right to file for contractually authorized rate increases under Section 4 whenever they deem such required. In their present Brief the Commission fails to even mention any of these cases except *Catco,* which it now contends supports its position because "there is nothing in the *Catco* opinion confining the Commission to conditions prescribing initial prices".[35]

We deem it only necessary to point out that the Court held in *Catco*:

> "The gas operator, * * * * is not without a remedy to protect himself (from a reduced initial price). He may, unless otherwise bound by contract, *United Gas Pipe Line Co. v. Mobile Gas Service*

[34] "It is true that in Catco; *Texaco Inc.* v. *FPC, supra,* 290 F.2d 149, *Atlantic Refining Company* v. *FPC,* supra, 316 F.2d 677, and *California Oil Co.* v. *FPC,* supra, 315 F.2d 652, * * * the courts assumed that any rate increases contractually permitted could be filed under Section 4 at any time after operations were commenced under a certificate. However, in none of those cases had the Commission sought to meet its hold-the-line obligation by a moratorium condition." Commission Brief, P. 39, in the court below.

[35] Commission Brief, P. 38.

> *Corp.*, 350 U. S. 332 (1956), file new rate schedules with the Commission." (At Pg. 389.)

Furthermore, the hold-the-line concept there mentioned necessarily exists only with "this framework in which the Commission is authorized and directed to act" which the court there outlined as above.

The economy of the natural gas industry has not changed from that existing eight years ago, when the Court in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division,* 358 U. S. 103, 113 (1958) held:

> "Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their products whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance."

Peculiarly appropriate here in light of the Commission's contentions is the case of *Willmut Gas & Oil Co. v. Federal Power Com.*, 294 F.2d 245 (D. C. Cir. 1961), *cert. den.* 368 U. S. 975 (1962), which held that the Act "does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates or that it may summarily reject or disallow the new schedule without a hearing" and that a reach for such power under Section 16 of the Act is unavailing. That court said:

> "But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to requirement of Section 4(d) of the Act that it notify the Commission of the changes * * * * ", 294 F.2d at Pg. 250.

B. *The cases relied on do not support Petitioners.* All Petitioners rely upon this Court's decision in *Federal Power Commission v. H. L. Hunt,* 376 U. S. 515 (1964). In that case it was held that in the issuance of a temporary certificate the Commission could properly require that the conditioned price not be increased so long as the temporary certification remain in effect. The Court upheld that condition stating:

> "In view of the *ex parte* nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certificated be continued unchanged until the permanent certificate is issued."

Following which, consistent with all prior decisions, it held that "at the point of permanent * * * * certification * * * * the provisions of Section 4 became applicable" and the producer is "then free" to pursue the rate filing procedure of that section (at P. 523). Thus, the *Hunt* case sustains the Commission's authority to preclude rate increases under temporary authorizations, but with equal clarity holds that such a prohibition is not proper in permanent certification. At the point of permanent certification Section 4 of the Act is fully available to the regulated company. To argue that the court did not say that the producers had particular "rights" under Section 4 is insupportable. The rate fixing and rate changing rights of a natural gas company are unaffected by the Act, but are only subject to the Commission's power of review. *Memphis Light, Gas and Water Div., supra.* Power not granted the Commission is a "right" preserved to the company.

Reliance on *Federal Power Commission v. Texaco, Inc.,* 377 U. S. 33 (1964) is equally misplaced. There,

a general rule [36] of the Commission providing that contracts after a particular date which contain indefinite pricing provisions will not be accepted in connection with certificate applications, or as rate schedules, was sustained. The basis of sustaining that rule and regulations pursuant thereto was "The present regulations do not pass on the merits of any rate structure or the merits of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants." (At P. 42) The instant applications have long since been deemed procedurally acceptable. Only the merits are here at issue.

In large measure in *Texaco Inc., supra,* the Court seems to have been impressed by the fact that the rule involved prevented entry into interstate commerce of sales with "pre-arranged escalation clauses" which have a "built-in device for ready manipulation of rates upward", from which the Commission in its rule-making hearing had determined the public interest should be protected. Here we are not concerned with any pre-arranged escalation clauses nor indefinite pricing provisions of any sort. Here the rates provided, as to which increases are sought to be precluded, are the very type of rates which it was there argued were not at all involved or proscribed by the rule.

C. *Moratorium is arbitrary and unreasonable.* Issue is taken with the finding of the court below that the Commission's moratorium proposal here would compel the producers to sell gas for nearly ten years at a price less than the initial contract price which may be just and reasonable, and which Respondents have no oppor-

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[36] Commission Order No. 242, 27 FPC 339.

tunity to timely seek. The Commission contends that this is factually inaccurate but then belies such contention by conceding that in at least one of the contracts the so-called "triggering level" of 23.55¢ is even below the initial contract price of 23.8¢.

Level. It is further argued that the "antitriggering" level is "reasonable" because it is "substantially" above the "in line" price. That it exceeds the Commission determined "in-line" price which is concededly *not* a just and reasonable rate does not clothe it with reasonableness. Neither is reasonable. There is *no* evidence in this record that a rate for these Respondents in excess of 23.55¢ per Mcf would in fact trigger any prices.[37] The contrary does appear (R. 23, 54, 131, 132, and 197). A contention that a finding is erroneous certainly includes legal error arising from total absence of evidence in the record.

Voluntariness. The Commission Brief (P. 43) contends that the reasonableness of the time limit of its rate increase moratorium, "nearly" ten years, is of no consequence because Respondents had "voluntarily chosen to operate" for approximately six years prior to the Commission's 1963 decision. The producers here voluntarily elected only to abide by the 1959 unconditioned permanent certificate orders. After those orders were vacated, they were *forbidden* to cease their sales. One of the Respondents here in fact then discontinued its sale and so advised the Commission. The result was a telegram from the Commission ordering

[37] The basis of the 23.55¢ line is found only in a Commission Staff pleading, i.e. "Memorandum of Position", R. 439. Such is not evidence. While binding on the Commission as a pleading and thus strongly indicative that the "in-line" price is at least 23.55¢, it has no further weight.

that "deliveries should be immediately resumed" (R. 385-386). These Respondents have been compelled by the Commission to continue operations.

V

Refunds

A. *The Constitution prohibits refunds here.* The testimony proffered by Respondents shows that on a historical cost-of-service basis their cost is "considerably in excess" of the contract prices sought to be certificate (R. 623).[38] That evidence was rejected and, therefore, is not subject to denial but must be taken as proven. *City of Pittsburg v. Federal Power Commission, supra* at 748-749.

The Commission is prohibited by the *Fifth Amendment to the Constitution of the United States*[39] and the *Natural Gas Act* from imposing a confiscatory rate on any regulated natural gas company because the standard of the Act "coincides" with that of the Constitution. *Federal Power Com. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 586, and the "lowest reasonable rate" is one which is not confiscatory, 315 U. S. at 585. The holding of the court below, that refunds could be calculated only after a determination of "just and rea-

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[38] As an example of individual cost see Ex. X-80, R. 366, which shows Respondent Superior Oil Company's unit cost at 24.34¢ per Mcf, exclusive of tax.

[39] Cf. *Los Angeles Gas Corp.* v. *Railroad Com.*, 289 U.S. 287, 305 (1933); *Railroad Com.* v. *Pacific Gas Co.*, 302 U.S. 388, 394, 395 (1938); *Denver Stockyard Co.* v. *United States*, 304 U.S. 470, 475 (1938); *Bluefield Water Works & Transportation Co.* v. *Public Service Com.*, 262 U.S. 679, 683 (1923).

sonable" rates was not expressly based on this proposition, but necessarily is supported thereby. This matter alone would require reversal of the Commission's refund order here.

B. *The Commission has no power to impose refunds.* Petitioner Federal Power Commission argues that the Commission, like a court, will correct what has been wrongfully done by virtue of its processes, and relies on *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134 (1919). That court so held, but specifically on the ground that such power is an "equitable" one "inherent in every court of justice", P. 146.

Of course, an administrative body is NOT a court. It has no "equitable" powers and necessarily has no power "inherent" to equitable power. With reference to the Federal Trade Commission, it has been held:

> "The Commission is an administrative body possessing only such powers as are granted by statute."

and it

> "* * * * * has not the additional powers of a court of equity to grant other and further relief * * * * on the theory that this is necessary to render effective the prescribed statutory remedy * * * * *". *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission,* 291 U. S. 587, 598 (1934).

The case of *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619, 623, 624 (1927), points out that such a body lacks "the authority of a court of equity" which extends even to the reviewing court.

Nor is there any doubt that the authority delegated to the Federal Power Commission falls short of the

power to order reparations or even to determine that past rates, not under suspension pursuant to Section 4, are unjust or unreasonable. *Federal Power Commission v. Hope Natural Gas Co.* 320 U. S. 591, 618, 619 (1944) " * * * * the Commission has no power to make reparation orders" but is limited to fixing rates "to be thereafter observed and in force" and "has no authority to enforce" findings of unlawfulness of past rates. See also *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U. S. 246, 254 (1951); *Civil Aeronautics Board v. Delta Air Lines, Inc.,* 367 U. S. 316, 325 (1961); *United States v. Seatrain Lines,* 329 U. S. 424 (1947); *T.I.M.E., Inc. v. United States,* 359 U. S. 464, 469-470 (1959).

Whenever the substantive act denies a power, no contrary power can be implied. *Stark v. Wickard,* 321 U. S. 288, 309 (1944).

In the circumstances of this case the Commission is exercising a rate making power—this power is quasi-legislative in nature. *Arizona Grocery Co. v. A.T. & S.F. Ry. Co.,* 284 U. S. 370 (1932). It may properly be only prospective in operation. *Prentis v. Atlantic Coast Line Co.,* 211 U. S. 210 (1908).

Hope Natural Gas Co. v. Federal Power Commission, 134 F.2d 287 (4 Cir. 1943) held specifically that under this Act the Commission has "quasi legislative, i.e., regulatory power as to the future rates; but there is no indication of any intention to clothe it with judicial or quasi judicial powers with respect to past charges or practices", at P. 309. This case was reversed on other grounds, *Federal Power Com. v. Hope Natural Gas Co.,* 320 U. S. 591 (1944), but in so doing the Court in effect affirmed the above statement say-

ing the Commission has "no power to make reparation orders" but only to fix rates "to be thereafter observed and in force", at P. 618.

C. *The cases relied on do not support Petitioners. Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 620 (1944), is relied upon as holding that an administrative body after remand of a prior order should retroactively act as conscientiously within the bounds of the power given it as it would have done initially had it limited itself to its authority, and to the same effect *Securities & Exchange Com. v. Chenery Corp.*, 332 U. S. 194 (1947), holding that after remand the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress.

Unquestionably the Commission here after remand should have dealt with the problems afresh, but it was still limited to exercise only the power granted. That grant does not include the power to order reparations. As pointed out in *Federal Power Com. v. Hunt, supra,* the Commission may act prospectively only under Section 7. In the words of the Court:

> "Clearly the Commission was given the power to lay down conditions precedent to the entry of the natural gas into interstate commerce." 376 U. S. at 526.

Obviously a "condition precedent" may not create a retroactive condition.

Petitioner Federal Power Commission cites, without specifically relying upon, *Public Service Com. of State of New York v. Federal Power Com.*, 329 F.2d 242 (C.A. D.C. 1964). That case dealt with refunds required in permanent certificate orders issued after temporary certificates had been in effect for some

while. The court referred to its prior decision, *The A lantic Ref. Co. v. Federal Power Commission,* 316 F.2 677, 679 (C.A. D.C. 1963), wherein it has held th there is "no mechanism for refunds of overcharg under Section 7", and distinguished the prior case o the ground that the quoted language was to be limite to *permanent certificates.* Considering the two case it seems clear that the D. C. Circuit Court has twic held there is in fact no mechanism for refund of ove charges where a permanent certificate has been issue We are not here concerned with temporary certificat orders."[40]

D. *In any event, refund payments should not be re quired.* With the issuance of the 1959 unconditione certificate orders there were certain operative an legal effects which necessarily followed. Those order were not stayed, and under Section 19(c) became ef fective. Respondents were thus required to file thei rate schedules and having filed them, to collect th rates there provided. Those rate schedules have neve been changed in any fashion. They are the only rate which have ever been effective for these sales and ar the only rates which any of these Respondents coul properly charge or accept under the Natural Gas Act Any departure from such filed rates would have vio lated the Act itself, *Hope Natural Gas Co. v. Federa Power Com.,* 134 F.2d 287, 311 (4 Cir. 1943), reverse on other grounds, *Federal Power Com. v. Hope Nat ural Gas Company,* 320 U. S. 591 (1944); *Louisvill & Nashville Ry. Co. v. Maxwell,* 237 U. S. 94, 9 (1915); *T.I.M.E., Inc. v. United States,* 359 U. S. 46 (1959); *Atlantic Coast Line RR Co. v. Fla.,* 295 U. S 301 (1935). In *Montana-Dakota Utilities Co. v. North*

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[40] Public Service Com. Brief P. 21.

western Public Service Com., supra, at 251, the Court specifically stated with reference to a regulated company under the Natural Gas Act:

> "It can claim no rate as a legal rate that is other than the filed rate, whether fixed or merely accepted by the Commission."

E. *Equitable standards preclude refund.*

(a) *The collections obtained were not excessive or unjust.* Clearly as the court below found, under the Act the consumer is not entitled to a windfall at the expense of the producer any more than the producer is entitled to a windfall at the expense of the consumer. Each is entitled to be served or paid on the basis established by the Act, i.e., a just and reasonable, non-discriminatory, non-preferential rate. As is admitted by all, the "in-line" price is not a "just and reasonable rate".[41]

Under equitable standards, restitution or refund of money is allowed only when the amounts collected by a prior erroneous order is excessive, so as to constitute "unjust enrichment". *Atlantic Coast Line RR Co.* v. *Florida, supra.* Respondents have not collected a "just and reasonable" or even "the lowest reasonable" rate. As mentioned above, their costs and financial requirements exceed the contract prices collected. Thus "unjust" enrichment is non-existent. There has been no "excessive" rate collected by Respondents and nothing, therefore, to restore.

It is argued that the Act does not guarantee a producer the right to file for and collect what he has urged

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[41] Commission Brief below P. 22. United Gas-Public Service Com. Brief below P. 12.

is a just and reasonable rate because initial certification is based upon a public convenience standard; however, public convenience and necessity contemplated by the Act can never *require* a non-compensatory or confiscatory rate. *Baltimore and Ohio Ry. Co.* v. *United States*, 298 U.S. 349 (1936); *Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942).

(b) *Petitioners made no effort to protect themselves.* Moreover, the rates which these producers have collected have been collected *because* the 1959 unconditioned certificate orders became effective. Respondents, totally unaggrieved by said orders, as a matter of law had no right to postpone their effectiveness. Furthermore, they could not reject them since they were "satisfactory" within the meaning of their contracts with the gas purchasers.[42] On the other hand, Petitioners were parties to those proceedings. United Gas Improvement and Public Service Commission felt themselves aggrieved by the 1959 orders and in fact sought judicial review thereof; however, they made no effort whatsoever to stay the effect of said orders. Absent a stay, under Section 19(c) of the Act the orders became effective.

The obtaining of stay orders is not at all unusual in connection with judicial review of orders which are deemed aggrieving. *Federal Power Com.* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949); *Natural Gas Pipeline Co.* v. *Federal Power Com.*, 128 F.2d 481 (7 Cir. 1942).

Any contention by Petitioners United Gas Improvement and Public Service Commission that a stay order

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[42] R. 42.

would have been denied if applied for is, of course, speculative. The short answer is they did not try.

The failure to seek a stay pending review is the sole reason refunds are a matter for consideration. Even a court will not exercise its equitable powers to protect a litigant who has not used means available to protect himself. *Latta* v. *Western Inv. Co.,* 173 F.2d 99 (9 Cir. 1949), *cert. den.* 337 U.S. 940.

Furthermore, as held in *National Savings Bank* v. *Cresswell,* 100 U.S. 630, 643 (1880), where one of two innocent parties must suffer a loss, the loss should fall on the one who by reasonable diligence could have protected himself and failed to do so. See also *Guice* v. *Burrage,* 156 F.2d 304 (5 Cir. 1946).

F. *The procedure of the decision below is proper.* Assuming *arguendo* that refunds could properly be required, the court below provided the only proper solution. Obviously refunds can not be based on an "in-line" price which is lower than a reasonable rate. No public purpose is served by imposing irreparable damage and loss on the Respondents to the extent that the "in-line" price is less than a just and reasonable rate. The consumer is not entitled to gas at less than the lowest reasonable rate under any circumstance. Thus the limiting of refunds to the amounts collected, if any, in excess of a just and reasonable rate is the only just solution.

This procedure does not present an administrative monstrosity at all; it merely requires compliance with the Act.

The *Federal Power Commission* v. *Tennessee Gas Transmission Company,* 371 U.S. 145 (1962), holding that refunds when due should be passed to the con-

sumer as quickly as possible is unrelated to the unique circumstances here. In that case the fact of excess collections—collections in excess of a just and reasonable rate—had been determined, and the proper amount of such excess established. That has not happened here. Here the right or equity of any refund, and even more, the proper amount thereof, is unknown. When payment of any refund will be irretrievably lost to Respondents, the amount should not be a speculative figure prematurely arrived at. This is particularly true where the refunds are from collections over the past six years and the only reason for hasty determination is a possible inadequacy of the refund procedure resulting from the transient nature of the gas consumer population. This inadequacy may in itself be greatly exaggerated since the population change is largely restricted to residential consumers and their shares of any refund based on field price reductions is extremely small. In area rate proceedings it has been shown that in 1963 in the New York and Philadelphia areas less than 15 percent of the total bill paid by all consumers was attributable to the charges made by producers for such gas. The relative share of residential users is the smallest of the several classes of users, i.e., industrial, commercial, and residential.

CONCLUSION

For the foregoing reasons, subject to the action of the Court on the questions raised in No. 26 hereof and the questions raised in Petitions For Writ of Certiorari in Nos. 34, 35, and 36 still pending before the court, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX "A"

"AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S.C.A. Constitution Amendment V.